DISCRETIONARY TRUST — EXECUTION BY COURT. — In the case of *Monson* v. *New York Trust Co.*, 35 N. E. Rep. 945 (N. Y.), the facts were substantially these: A testator left his property to his executor in trust with a request that his own investments be continued, so long as not detrimental to the estate. The income was to be applied to the use of the widow for her life. Upon her death the executor was to form four trust funds for the testator's four daughters, of "the value and amount of twenty thousand dollars" each, and to pay over the residue to the two sons. The executor had the option of paying the trust legacies of the daughters in money and then investing it, or of setting apart securities out of the estate. The widow received the income of the estate during her life, but upon her death the executor did not form the four trust funds but left the estate *in solido*, paying to each daughter the interest on $20,000 and the balance of the income to the sons until his own death in 1892. Between the death of the widow and this time the estate had increased greatly in value, owing to the appreciation of certain investments. The sons, therefore, claimed that the residue of the estate should be paid to them after deducting the daughters' shares of $20,000 each, while the daughters claimed a right to participate *pro rata* in the increase, because, as they alleged, the investments represented the trust estates belonging to them under the will. The court allowed the daughters to participate in the increase of the estate in the proportion their shares of $20,000 bore to the value of the entire estate at the death of the widow.

The reasoning of the court is as follows: "Although," they say, "the executor had the right upon the death of the widow to pay these trust legacies in money, or to set apart such of the securities in which the estate was invested as in his judgment he should think best (up to the stated value), yet we think that when he omitted to do either, he must be deemed to have made such an allotment proportionately in all of the securities in which the estate was invested." But how can it be said that an executor "must be deemed to have made an allotment" by absolutely refraining from doing anything? A conclusive answer to the argument of the court would seem to be furnished by the simple fact that the executor actually made no allotment but kept the estate *in solido*. Therefore, as no fund was ever set apart for the daughters, they could not invoke the doctrine of following trust property (the real ground that the court adopted) to support any claim to the increase of the estate.

Undoubtedly, the failure of the executor to carry out the trust ought not to prejudice the daughters. As Sir Joseph Jekyll once quaintly put it, "The forbearance of trustees in not doing what it was their office to have done shall in no sort prejudice the *cestuis que trustent*, since at that rate it would be in the power of trustees either by doing or delaying to do their duty to affect the right of other persons; which can never be maintained. Wherefore, the rule in all such cases is that what ought to have been done shall be taken as done." And the remark of Lord Eldon in *Burgess* v. *Wheate*, 1 Wm. Black. 129, is equally important: "Nothing is looked upon in equity as done but what ought to have been done, not what might have been done." The question, then, in this case, where the court on the death of the executor and his failure to execute the trust are obliged to administer it, is what really "ought to have been done" in view of the expressed intention of the testator? By what rule can the court fairly settle the property between a specific and residuary legatee where the executor had the option of paying the specific legacy

in securities allotted from the estate or in money, and actually did neither?

If the testator had directed his executor to set apart for each daughter such securities of the estate as he saw fit to the value of $20,000, without any option to pay money, and the executor had failed to do so, the court in executing the trust upon the executor's death would doubtless have allowed each daughter to share in any increase of the estate in the proportion her $20,000 bore to the entire estate at the time the breach of trust was committed. In such a case one could say the testator evidently intended to give each daughter a portion of his investments. That is, the executor would be bound to use his discretion and to exercise it upon those particular funds. The court would, acting in his stead, apply the only equitable rule of dividing the increase among the legatees in the proportions the amounts of their original legacies bore.

But the principal case seems different. The executor was not obliged to form the trusts for the daughters out of the investments, for if he wished he could pay them in cash. He did neither. What rule can the court adopt which, when generally applied, would carry out the intention of the testator?

It is evident from the will that the primary object of the testator was to provide for his daughters trust legacies of $20,000 each. Trusts to that amount were to be formed in spite of all fluctuations of the estate between the death of the testator and his widow. That is, any loss that might occur up to the time of the division was evidently to be borne by the sons. They were to have all the risk. And it would, therefore, be wholly contrary to the plain design of the testator to suppose the daughters would have to bear the loss proportionately with the sons if the estate had depreciated in value, and the court had had to execute the trusts. Surely it would, then, have been urged as eagerly that the trust legacies were pecuniary, as it was in the principal case that they be treated as shares in the investments existing at the widow's death. And the contention would have been right and would have prevailed, for the intention was to protect the daughters in any event. But, whatever rule be adopted, it seems clear it ought to be reasonably consistent, and not such as would allow the daughters to call their interests pecuniary legacies when the estate depreciated, and shares in the specific investment when it increased in value. The court cannot say the executor ought to have allotted the investments, because that matter was discretionary with him. The only theory whereby the testator's evident intention of providing for his daughters in any event can be carried out is the one which treats the trust funds to be formed for them as payable in cash.

Since, therefore, the sons as residuary legatees would have to bear any depreciation of the estate they ought to get the increase. When this argument was pressed by counsel in the principal case, the court met it by dodging it. "What might have been the result," they say, "of a contention upon facts which never occurred, and under circumstances which probably would have differed radically from those now under our observation, it is plainly useless to speculate concerning." This speculation so "plainly useless" seems the turning point in the case. Moreover, if it is correct to assume that courts decide cases upon principles of law, and not upon the particular merits of each controversy, it is always not only relevant but absolutely necessary for a Court to consider the effect of a principle it adopts when generally applied.